

## Merit Systems Protection Board

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the hearing notice unless the parties agree to an earlier date. The agency, upon request of the judge, must provide appropriate hearing space.

(b) The judge may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.

(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must describe the reasons for the request. The judge will grant the request for postponement only upon a showing of good cause.

(d) The Board has established certain approved hearing locations, which are listed on the Board's public Web site ([www.mspb.gov](http://www.mspb.gov)). The judge will advise parties of these hearing sites as appropriate. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62366, Oct. 12, 2012]

### § 1201.52 Public hearings.

(a) *Closing the hearing.* Hearings are generally open to the public; however, the judge may order a hearing or any part of a hearing closed when doing so would be in the best interests of a party, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.

(b) *Electronic devices.* Absent express approval from the judge, no two-way communications devices may be operated and/or powered on in the hearing room; all cell phones, text devices, and all other two-way communications devices shall be powered off in the hearing room. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational,

and/or powered on in the hearing room without the consent of the judge.

[77 FR 62366, Oct. 12, 2012]

### § 1201.53 Record of proceedings.

(a) *Recordings.* A recording of the hearing is generally prepared by a court reporter, under the judge's guidance. Such a recording is included with the Board's copy of the appeal file and serves as the official hearing record. Judges may prepare recordings in some hearings, such as those conducted telephonically.

(b) *Transcripts.* A "transcript" refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board as the official hearing record. Any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense. Judges do not prepare transcripts.

(c) *Copies.* Copies of recordings or existing transcripts will be provided upon request to parties free of charge. Such requests should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Nonparties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the Board's regulations. A nonparty may request a copy by writing to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC, as appropriate. Nonparties may also make FOIA requests online at <https://foia.mspb.gov>.

(d) *Corrections to transcript.* Any discrepancy between the transcript and the recording shall be resolved by the judge or the Clerk of the Board, as appropriate. Corrections to the official transcript may be made on motion by a party or on the judge's own motion or by the Clerk of the Board, as appropriate. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be made only when substantive errors are found by the judge

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or by the Clerk of the Board, as appropriate.

(e) *Official record.* Hearing exhibits and pleadings that have been accepted into the record, the official hearing record, if a hearing is held, and all orders and decisions of the judge and the Board, make up the official record of the case. Other than the Board's decisions, the official record is not available for public inspection and copying. The official record is, however, subject to requests under both the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) pursuant to the procedures contained in 5 CFR parts 1204 and 1205.

[77 FR 62366, Oct. 12, 2012]

## § 1201.55 Motions.

(a) *Form.* All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with the judge or the Board, as appropriate, and must be served upon all other parties in accordance with §1201.26(b)(2) of this part. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

(b) *Objection.* Unless the judge provides otherwise, any objection to a written motion must be filed within 10 days from the date of service of the motion. Judges, in their discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.

(c) *Motions for extension of time.* Motions for extension of time will be granted only on a showing of good cause.

(d) *Motions for protective orders.* A motion for an order under 5 U.S.C. 1204(e)(1)(B) to protect a witness or other individual from harassment must be filed as early in the proceeding as practicable. The party seeking a protective order must include a concise statement of reasons justifying the motion, together with any relevant docu-

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mentary evidence. An agency, other than the Office of Special Counsel, may not request such an order with respect to an investigation by the Special Counsel during the Special Counsel's investigation. An order issued under this paragraph may be enforced in the same manner as provided under subpart F for Board final decisions and orders.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 17045, Apr. 9, 1997]

## § 1201.56 Burden and degree of proof.

(a) *Applicability.* This section does not apply to the following types of appeals which are covered by §1201.57:

(1) An individual right of action appeal under the Whistleblower Protection Act, 5 U.S.C. 1221;

(2) An appeal under the Veterans Employment Opportunities Act, 5 U.S.C. 3330a(d);

(3) An appeal under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and

(4) An appeal under 5 CFR 353.304, in which the appellant alleges a failure to restore, improper restoration of, or failure to return following a leave of absence.

(b) *Burden and degree of proof—*(1) *Agency.* Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (c) of this section, the agency bears the burden of proof and its action must be sustained only if:

(i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence (as defined in §1201.4(p)); or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence (as defined in §1201.4(q)).

(2) *Appellant.* (i) The appellant has the burden of proof, by a preponderance of the evidence (as defined in §1201.4(q)), with respect to:

(A) Issues of jurisdiction, except for cases in which the appellant asserts a violation of his right to reemployment following military duty under 38 U.S.C. 4312–4314;

(B) The timeliness of the appeal; and

(C) Affirmative defenses.